

ICTR-00-56-T  
26-10-2005  
(20600-20597)

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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before:** Judge Asoka de Silva, Presiding  
Judge Taghrid Hikmet  
Judge Seon Ki Park

**Registrar:** Mr Adama Dieng

**Date:** 26 October 2005

**The PROSECUTOR**  
v.  
**Augustin BIZIMUNGU**  
**Augustin NDINDILYIMANA**  
**François-Xavier NZUWONEMEYE**  
**Innocent SAGAHUTU**  
*Case No. ICTR-00-56-T*

2005 OCT 26 10:00 AM  
ICTR

**DECISION ON NDINDILYIMANA'S REQUEST FOR CERTIFICATION TO  
APPEAL THE CHAMBER'S DECISION DATED 21 SEPTEMBER 2005**

**Office of the Prosecutor:**

Mr Ciré Aly Bâ  
Mr Alphonse Van  
Ms Ifeoma Ojemeni Okali  
Mr Segun Jegede  
Mr Moussa Sefon  
Mr Abubacarr Tambadou  
Ms Faria Rekkas  
Ms Anne Pauline Bodley

**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Ronnie MacDonald for **Augustin Bizimungu**  
Mr Christopher Black for **Augustin Ndindiliyimana**  
Mr Charles Taku for **François-Xavier Nzuwonemeye**  
Mr Fabien Segatwa and Mr Seydou Doumbia for **Innocent Sagahutu**

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”),

**SITTING** as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

**BEING SEIZED OF** the « *Requête en certification d'appel contre la* “Decision on the Prosecution’s Motion dated 9 August 2005 to vary its list of witnesses pursuant to Rule 73 bis (E)” », filed on 26 September 2005 (the “Motion”);

**NOTING** that the Prosecution has not filed a response;

**RECALLING** its Decision on the Prosecution’s Motion dated 9 August 2005 to vary its list of witnesses pursuant to Rule 73 bis (E) rendered on 21 September 2005 (the “Impugned Decision”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 73 (B);

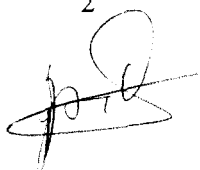
**HEREBY DECIDES** the Motion on the basis of the written brief filed by the Defence pursuant to Rule 73(A) of the Rules.

#### **SUBMISSION**

1. The Defence for Ndingiyimana requests for certification to appeal the Impugned Decision pursuant to Rule 73(B). The Defence submits that the Impugned Decision raises a question that affects the fairness, progress and outcome of the proceedings and that a resolution by the Appeals Chamber would materially advance the proceedings.
2. The Defence submits that in paragraphs 17 to 33 of its response of 15 August 2005 to the Prosecution’s Motion to vary its list of witnesses, it explained at length that the redacted statement of Witness ANC contains new charges and massacre sites that are not mentioned in the Indictment. The Defence contends that they were also not related to any of the 119 paragraphs of the Indictment. It cites as an example the allegation that the Accused transported and distributed weapons to members of the militia in the city of Kigali.<sup>1</sup>
3. The Defence further submits that the Chamber did not pronounce itself upon the other new charges presented in Witness ANC’s statement.
4. Accordingly, the Defence submits that it is clear that the Impugned Decision will fundamentally affect the fairness of the proceedings and the outcome of the trial.
5. Finally, the Defence submits that a favourable decision by the Appeals Chamber will spare the Defence the burden of having to find new Defence witnesses in connection with the new charges and the new sites, and that this would help advance the proceedings and the Trial in general.

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<sup>1</sup> Paras. 13-15 of the Motion.

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## DELIBERATIONS

6. The Chamber recalls Rule 73(B) which reads as follows:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber recalls its previous Decisions in which it discussed the criteria for certification under Rule 73(B).<sup>2</sup> In particular, the Chamber notes the principle that decisions under Rule 73 are “without interlocutory appeal” and that certification to appeal is an exception that the Chamber may grant, if the two criteria under Rule 73(B) are satisfied.

8. The Chamber is of the view that the addition of new witnesses at this stage of the proceedings is an important issue going to the fairness and expeditious conduct of the proceedings and could affect the outcome of the trial.

9. However, the Chamber is of the opinion that an immediate resolution by the Appeals Chamber in the present case would not “materially advance the proceedings.” The Chamber recalls that by the Decision of 21 September 2005 it allowed the Prosecution to add Witnesses ANC and ATW “in the interests of justice.” In reaching that Decision, the Chamber took into account the proposed testimony of the said witnesses in relation to allegations in the Amended Indictment.

10. The Chamber further recalls that in reaching its Decision, it considered the Prosecution’s undertaking that the additional witnesses will only be called at the end of the trial. In the Chamber’s view, that would give the Defence sufficient time to investigate any allegations that Witnesses ANC and ATW may make and to prepare for cross-examination.

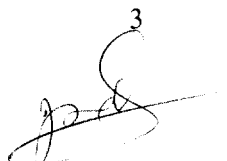
11. The Chamber recalls that the exercise of discretion is primarily a matter for the Trial Chamber and absent abuse, is not amenable to review by the Appeals Chamber.<sup>3</sup> The Chamber notes that the Defence has not alleged any abuse of discretion on the part of the Trial Chamber by allowing the Prosecution to add Witnesses ANC and ATW to its witness list.

12. More importantly, however, the Chamber recalls that allowing the Prosecution to add Witnesses ANC and ATW to its witness list is a completely different matter from admitting the witnesses’ testimony, in whole or in part, into evidence. The question of admissibility of evidence will be determined during the course of the witnesses’ testimony, and the Defence may raise any objections at that stage. The Chamber therefore concludes that an immediate

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<sup>2</sup> *The Prosecutor v. Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, Innocent Sagahutu*, ICTR-00-56-T, “Decision on Sagahutu’s Request for Certification to Appeal” (TC), rendered on 9 June 2005, para. 16. 17; “Decision on Bizimungu’s Request for Certification to Appeal the Oral Decision Dated 8 June 2005” (TC), rendered on 30 June 2005.

<sup>3</sup> *The Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, “Decision on Certification of Appeal concerning admission of written statement of Witness XXO” (TC), 11 December 2003, para. 8.

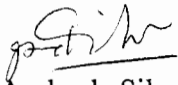
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resolution of this issue by the Appeals Chamber will not “materially advance” the current proceedings.


**FOR THE ABOVE REASONS, THE CHAMBER**

**DISMISSES** the Defence Motion.

Arusha, 26 October 2005

  
Asoka de Silva  
Presiding Judge

  
Tahir Hikmet  
Judge  
  
[Seal of the Tribunal]

  
Seon Ki Park  
Judge